MOTION FILED

SEP 18 1997

(2)

No. 97-307

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS, INC.,
Petitioner,
v.
CHARLES D. VON DER AHE and
CHROMA LIGHTING,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GROCERY MANUFACTURERS OF AMERICA, INC. IN SUPPORT OF THE PETITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11 pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, Grocery Manufacturers of America, Inc. ("GMA") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition filed by Osram Sylvania Products, Inc. Petitioner has consented to the filing of this brief. Respondent has not consented to the filing of this brief.

GMA is a non-profit voluntary business association that represents more than 130 companies that manufacture and distribute products primarily sold in retail grocery stores throughout the United States. GMA's member companies have annual sales of more than $400 billion.

GMA and its members have had a longstanding, keen interest in matters relating to the sale and distribution of

products sold in retail grocery stores in the United States. This includes the interpretation and enforcement of the federal antitrust laws, and especially the Robinson-Patman Act. The Robinson-Patman Act was enacted in 1936 at the behest of a wholesale grocers' association to address alleged pricing abuses in the grocery manufacturing industry.[1] Since the Act's adoption, numerous cases have been brought that involve this industry. Indeed, the grocery manufacturing industry can be viewed as the Act's "test tube"; many of this Court's Robinson-Patman Act opinions involve grocery products.[2]

GMA believes that vigorous price (and non-price) competition should be encouraged in an environment where the rules regulating such competition are clear, predictable, and rational. This is particularly true in an industry like the grocery industry, in which there are list prices which are affected by rebates, coupons, volume discounts, shelf payments, etc. This makes pricing decisions complicated, but critical to the competitiveness of the industry. To expose these countless pricing and competitive decisions—which substantially enhance competition—to treble damage liability would have a severe chilling effect on the very price-cutting decisions that lie at the heart of the competitive process.

GMA is concerned that the Ninth Circuit's decision will not only encourage Robinson-Patman Act treble damage litigation, but will create a great deal of uncertainty with respect to pricing decisions in industries, such as grocery manufacturing, where volume discounts and rebates are

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[1] *See generally In re General Motors Corp.*, 103 F.T.C 641, 691 (1984). *See also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11-23 (1962).

[2] *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Borden Co.*, 383 U.S. 637 (1966); *United States v. Borden*, 370 U.S. 460 (1962); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

prevalent. This can serve only to dampen competition severely, which ultimately results in increased costs to consumers for basic needs.

For the foregoing reasons, GMA respectfully requests that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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September 18, 1997

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BRIEF AMICUS CURIAE OF GROCERY MANUFACTURERS OF AMERICA, INC. IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

GMA's interest in the issue presented by the petition is substantial and direct for the reasons set forth in the foregoing motion for leave to file this brief. In sum, GMA's member companies are responsible for 90 percent of all food and consumer packaged goods sold in the United States.* Those companies need to know with certainty whether their competitively driven pricing decisions will pass muster under governing law. Because the law governing claims under the Robinson-Patman Act differs from circuit to circuit, GMA's members lack that cer-

* Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

tainty. Moreover, in light of the Ninth Circuit decision at issue here, GMA's members face an increased risk of antitrust suits seeking treble damages based on conduct that is pro-competitive and indisputably benefits overall consumer welfare.

REASONS FOR GRANTING THE PETITION

The petition offers a classic case for this Court's intervention. The Courts of Appeals are clearly divided on the important antitrust issue presented. The Ninth and Third Circuits have held that in a Robinson-Patman Act case charging a defendant with offering the same product to different buyers at different prices (a "secondary-line" price discrimination case), the presumption of harm to competition established by proof of injury to an individual competitor [1] *cannot* be overcome by proof of no actual harm to competition.[2] The D.C. Circuit has held that the presumption *can* be rebutted, and the First, Second, Eighth and Tenth Circuits have likewise suggested in dictum that proof of no actual harm to competition would defeat a secondary-line claim.[3] There is no ostensible benefit to allowing this issue to "percolate" any longer in the lower courts: the split in authority is established and unlikely to resolve itself.

In addition to satisfying this traditional criterion for certworthiness, this case offers the Court a good vehicle for resolving the antitrust issue presented in the petition:

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[1] *FTC v. Morton Salt*, 334 U.S. 37, 50-51 (1948).

[2] Pet. App. at 13a; *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991). The Eleventh Circuit has suggested that it would follow the same approach. *See Alan's of Atlanta v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

[3] *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988); *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 193-94 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996); *H.L. Hayden v. Siemens Medical Sys.*, 879 F.2d 1005, 1021 n.12 (2d Cir. 1989); *Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984).

the issue was clearly raised and adjudicated at the trial and appellate levels, both sides of the issue will be ably briefed, and there are no procedural impediments to reaching and deciding the issue presented.

In short, this split in authority is one which the Court needs to resolve, and it should do so in this case.

I. THE CIRCUIT SPLIT IS CLEAR AND WILL NOT RESOLVE ITSELF.

The Ninth Circuit panel that decided this case candidly acknowledged the split in authority that the petition is asking this Court to resolve:

> The question presented by Sylvania's appeal is whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy. The question was left open by *Morton Salt*, and the circuits are divided on the issue.

Pet. App. 4a-5a.

Siding with the Third Circuit, the court below ruled unambiguously that "in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." Pet. App. 13a. The panel explicitly acknowledged and rejected the D.C. Circuit's directly contrary conclusion:

> In *Boise*, the D.C. Circuit held that the language of the Robinson-Patman Act, which prohibits price discriminations that tend to "injure, destroy, or prevent competition," indicates that Congress was concerned about the preservation of competition, and not the protection of individual competitors. . . . Asserting that harm to competiiton is "the name of the Robinson-Patman game," [837 F.2d] at 1143, the D.C. Circuit reasoned that it would "def[y] both logic and the import of *Morton Salt*" to hold that

> an inference of competitive injury derived from evidence of harm to individual competitors may not be overcome when there is no actual harm to competition. *Id.* at 1144.
>
> * * * *
>
> We agree with . . . the Third Circuit. We are persuaded that the language that the Robinson-Patman Act added to § 2(a) of the Clayton Act—"to injure, destroy, or prevent competition"—expresses Congressional intent to protect individual competitors, not just market-competition, from the effects of price discrimination.

Pet. App. 6a, 9a.

The foregoing excerpt reveals that the critical question underlying the issue presented in this case is whether, in the context of secondary-line price discrimination claims, the Robinson-Patman Act is intended to protect individual competitors (as the Ninth and Third Circuits have held) or competition (as the D.C. Circuit has held). Thus, although several circuits have not ruled on the *precise* question presented here, those courts' statements regarding the competitor-versus-competition focus of the Robinson-Patman Act are highly predictive of how those same courts would rule on the issue presented in the petition.[4]

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[4] The Eleventh Circuit shares the Third and Ninth Circuits' view that, in secondary-line cases, the Robinson-Patman Act is intended to protect individual competitors instead of competition. *See Alan's of Atlanta*, 903 F.2d at 1418 n.6 ("[I]njury to competition is proved by showing an injury to competitors"). The Second, Eighth and Tenth Circuits share the D.C. Circuit's position that, in secondary-line cases, the Act is intended to protect competition rather than individual competitors. *See, e.g., H.L. Hayden*, 879 F.2d at 1021 n.12 ("[V]iolation of 15 U.S.C. § 13(a) requires not only proof of price discrimination, but a potential impact substantially to lessen competition or create a monopoly in any line of commerce"); *Richard Short Oil Co., Inc.*, 799 F.2d at 420 ("[A]nalysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses"); *Black*

There is, therefore, no good reason for the Court to await further consideration of this issue by the lower courts.

II. THIS COURT'S RECENT DECISIONS HAVE NOT ELIMINATED EXISTING CONFUSION ON THIS ISSUE.

This Court's most recent Robinson-Patman Act decisions suggest strongly that the D.C. Circuit is right and the Ninth Circuit and Third Circuit are wrong. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), for example, this Court held that "the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition," *id.* at 220, and "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.' " *Id.* at 224 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in *Brooke Group*). Although *Brooke Group* concerned a primary-line Robinson-Patman Act claim (*i.e.*, one alleging that the defendant offered price discounts in order to take business from direct competitors of the defendant), this Court did not limit the foregoing statements to primary-line claims. As such, it is difficult to square the panel's statement in this case that "the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general" (Pet. App. 5a) with the language from *Brooke Group* set out above.

Nonetheless, the court below determined that the Court's reasoning in *Brooke Group* does not apply to the secondary-line price discrimination claim at issue here. Pet. App. at 12a ("We decline to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims."). The Third Circuit has likewise adhered to its view that a secondary-line price discrimination claim prop-

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Gold, Ltd., 729 F.2d at 680 ("The primary purpose of the Act is to protect the competitive process, not individual competitors").

erly focuses on injury to competitors without regard to injury to competition—even following this Court's decision in *Brooke Group*. *See Stelwagon Mfg. Co. v. Tarmac Roofing*, 63 F.3d 1267, 1272-73 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996).

These decisions demonstrate that this Court's existing body of Robinson-Patman Act jurisprudence is not sufficiently clear to eliminate the division in circuit authority on the question presented in the petition. This Court should therefore accede to the requests of courts and legal scholars and clarify whether secondary-line price discrimination claims—like all other claims under the antitrust laws—fail in the face of proof that the challenged conduct has not harmed competition.[5]

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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[5] *See, e.g., Coastal Fuels*, 79 F.3d at 193 (indicating the need for further guidance from this Court regarding post-*Brooke Group* treatment of secondary-line claims); Herbert Hovencamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (1994) § 14.6a (stating that, after *Brooke Group*, "a reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue").